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File No. O. Pub. Security Measures/52

P2HE Legal Deptt.

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Subject:— Opinions under the Bombay Public Security Measures Act 1947

O. Pub. Security Measures/52

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C O N T E N T S.

Legal Department Vol.No.O.Contract/1949.

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7.	O.No.7049/25.6.49.	Re: Re-employment of Mr. Divekar, retired conservator of Forests by Govt. for a period of six months in the first instance, as Director of Forest training in Bombay Forest service, class I, on the following conditions among others:- 1. The unexpired portion of the leave sanctioned to Mr. D. should be granted to him after the termination of his re-employment and during this leave period Mr.D. should be granted the same leave salary which he would have got had his leave not been cut short by re-employment, his pension being kept in abeyance till the expiry of this leave. 2. Mr. D. should be allowed leave admissible for the further period of active service; 3. The re-employment shall be terminable by three months, notice on either side. Questions. 1) Whether Mr. D. is entitled to the unexpired portion of leave which had been interrupted when he was re-employed by Bombay Govt. and is admissible for the further period of active service with the Govt. of Bombay as per conditions of his reemployment; and 2) whether he is entitled to three months' notice for the termination of his services with the Govt. of Bombay.	23-2-3
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13.	O.No.634-Confl./ 6-10-49.	Re: Contract entered into with Govt. by the Karnatak Printing Press for supply of copies of Gujarati Reader within a particular period. Deposit and earnest money to be kept with Govt. till the contract is fullfilled. Question whether the two sums of money deposited with Govt. can be forfeited on the ground that the Press was unable to perform its contract within the specified time.	59-64
14.	R.I.No.747-Confl. 25-11-49.	G.L., E.D.No.7599/2907-H dt.22-11-49 Re: Text Books. Printing of - Penal action against the K.P. Press for delaying the Gujarathi Reader I (1st Edition). (copies not taken)	65-66
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S.R.C 245

Office of the R.L.A.

Payment of brokerage in sale of lands by Government by public auction.

It appears that by a Memorandum issued to the Collector of Bombay on 1st July 1935, Government decided that brokerage on the sale or leases of lands in Bombay should continue to be paid after the execution of the necessary document in accordance with the orders of Government contained in G.R., D.D., No. S.A. 282, dated the 25th February 1925. By G.R., R.D. No. 7414/26, dated the 20th January 1936, Government issued orders regulating the payment of brokerage by Government for the disposal of lands in Bombay City and the Bombay Suburban District. By G. R., R.D., No. 804-C/45, dated the 12th October 1946, Government directed the discontinuance of payment of brokerage by Government for the disposal of land in Bombay City and the Bombay Suburban District. It appears that before the aforesaid G.R. was issued certain lands were sold by public auction by the Collector of Bombay. Messrs. V.K. Chhapia and Co., Architects, whose bid on behalf of their clients was accepted for these lands, are claiming brokerage. The Collector reports that the disposal of the lands was facilitated by these agents and their claim for payment of brokerage on these transactions is justifiable. In a similar case H.M., R.D., directed that no brokerage should be paid for disposal of lands by auction (see Government letter No. 1696-C/45, dated 14.7.1948). The question raised for the R.L.A's consideration is whether the agents in the present case are entitled to brokerage.

2. "Where the agency is not a gratuitous one but one for reward, the agent would be entitled to his remuneration, whether it be stipulated expressly or impliedly, as seen from the conduct of the parties. Where a professional agent is employed, the mere fact of employment raises a presumption of a contract to remunerate and this right to remuneration arises as soon

MCP/1/96.

as the business of agency is completed" (see Myer's Law of Contracts, p. 434). The Government Resolution No. 7414/26, dated 20th January 1926, read with the Government Memorandum, R.D., No. 7414-C/26, dated the 1st July 1935, implies that brokerage was payable by Government for disposal of land in Bombay City and the Bombay Suburban District. This means that the agent who has procured the purchaser of Government's land in Bombay City and Bombay Suburban District would be entitled to brokerage as his remuneration. An auction sale is a sale at which each bidder offers an increase upon the price offered by the preceding bidder, the article put up being sold to the highest bidder (see Secretary of State v. Sunderji Shivji, 40 Bom. L.R. 285-P.C. 291). In other words, it is a sale by public competition to the highest bidder. The auction sale is always subject to certain conditions and if professional brokers bid at such sales and the same is knocked down in their favour, they would be deemed to be purchasers. It appears from the public notice of auction sale at p. 35 ante and the conditions of auction sale at pp. 37-39 ante, that there was no offer for agents to secure bidders at the auction sale nor was there any express or implied condition for payment of brokerage to those who secure the highest bidder or one whose bid would be accepted by Government. It is not possible to infer from the aforesaid G.R. of 1926 any implied condition of payment of brokerage even in cases where lands are disposed of by public auction, which contemplates no agency to procure purchasers. It appears that these considerations weighed with H.M., R.D., when he directed that no brokerage should be paid when lands were sold by public auction. As stated above, brokerage would be payable to one who procures a purchaser for Government lands. An auction sale being an open offer to all who intend to purchase the lands, there would arise no question of employing any kamik broker to procure purchaser

Consequently, it appears that no brokerage would be payable to the agents in the present case.

Sd/- P.N.Lal.

12.4.

Remembrancer of Legal Affairs.

U.R. to R.D., No. 4024, dated the 13th April 1949.

V.M.D./-15.6
40.

Office of the R.L.A.

Indian Contract Act, section 151. Carrier's liability for consignment burnt at a Railway Station.

Since the delivery of the consignment was taken the Railway's liability ceased and the Railway would not be liable for the destruction thereof by fire.

Mr. R.G. Gandhi who took delivery of the consignment through his Hundekari was bound to take as much care of the consignment as a man of ordinary prudence would under similar circumstances take of his own goods under section 151 of the Indian Contract Act and he is liable for the negligence of his Hundekari unless the act resulting in the destruction of the consignment was unauthorised and beyond the scope of his employment. A person who does such business is ordinarily expected to know the risk of leaving the goods on the Railway premises after taking delivery thereof. The reason adduced for leaving the consignment on the Railway premises is hardly plausible and no man of ordinary prudence would have taken such a course. Consequently a suit would be maintainable against Mr. Gandhi and his Hundekari for the price of the consignment consignment.

Sd/- P.M.Lad.

19-4

Remembrancer of Legal Affairs.

U.R. to R.D., No. 4275, dated the 20th April 1949.

V.M.D./15.6
46.

Office of the R.I.A.

Claims of Mr. Divekar.
—
The Indian Contract Act.

Section 62.

By G.R., R.D. No.2226/45 dated 23.7.1946, Mr. Y. R. Divekar, retired Reserve Conservator of Forests, was re-employed by Government for a period of six months in the first instance and directed to hold the post of Director of Forest Training in Bombay Forest Service, Class I, on the following among other conditions:

(1) The unexpired portion of the leave sanctioned to Mr. Divekar should be granted to him after the termination of his re-employment and during this leave period Mr. Divekar should be granted the same leave salary which he would have got had his leave not been cut short by re-employment, his pension being kept in abeyance till the expiry of this leave.

(2) Mr. Divekar should be allowed leave admissible for the further period of active service.

(3) The re-employment shall be terminable by three months' notice on either side

By G.R., R.D. No.2226/45 dated 6-6-1947 the temporary post of Director of Forest Training was extended for a further period of 9 months with effect from 1st July 1947 and Mr. Divekar was directed to continue to hold that post. In the meantime, it was found that Mr. Divekar had finished his work as Director of Forest Training and consequently he was posted as Conservator of Forests, North Eastern Circle, Nasik (see Government Notification, P.& S.D. No. S-20 /10 dated 12th September 1947). By P.& S.D. d.o. No. 6-1 dated 15th December 1947 Mr. Divekar was informed that his services were placed at the disposal of the Government of India for appointment as Director of Disposals on conditions that he should be given a salary of Rs. 1,300/- ~~1,000/-~~ per month and that his services under the Government of India were terminable at one month's notice on either side. After he served the Government of India for about a year, his services

with the Government of India were terminated by one month's notice with effect from 8th January 1949. Thereafter the Bombay Government were not prepared to re-employ him. The questions raised for the R.L.A's consideration are:

(1) whether Mr. Divekar is entitled to the unexpired portion of leave which had been interrupted when he was re-employed by Bombay Government and is admissible for the further period of active service with the Government of Bombay as per conditions of his re-employment sanctioned by G.R., R.D. No. 2226/45 dated 23-7-1946, and

(2) whether he is entitled to three months' notice for the termination of his services with the Government of Bombay ?

It is true that Mr. Divekar's services were placed at the disposal of the Government of India without consulting him and also without previously determining the conditions of his service, but these conditions of service were settled subsequently, and communicated to Mr. Divekar; and Mr. Divekar did & join his duties and serve the Government of India with full knowledge of the conditions regarding some of which he mk had even made a faint hearted protest. It would, therefore, be proper to conclude that Mr. Divekar acquiesced in the terms and conditions of service offered by the Government of India. The effect of his acceptance of service with the Government of India would be substitution of a new contract for the old contract between him and the Government of Bombay; and in that connection it is essential to note that the Government of Bombay treated the same case as one of termination of services under them when Mr. Divekar took re-employment under the Government of India. In other words, there was a novation as provided :-

Indian Contract Act, which principle is explained in Scarf v. Jardine (1882) 7 Appeal Cases 345, at p. 351 in the House of Lords as follows:

> "There being a contract in existence, some new contract is substituted for it either between the same parties (for that might be) or between different parties, the consideration equally being the discharge of the old contract."

Consequently, the contract between the Government of Bombay and Mr. Divekar was discharged on the latter's accepting service of the Government of India. He would not, therefore, in law be entitled either to the leave rights or to the three months' notice as per terms of contract sanctioned by Government x under G.R., R.D., No. 2226/45 dated 23-7-1948. However, considering the facts of the present case, and the assurance given in D.O. No. 8448/45-D dated 25-6-1948 - p. 373 File 1947 No. 6/ 1 appts. part C, Mr. Divekar should be allowed in equity the leave rights under his original contract with this Government.

Sd/- P.M.Lad.
24-6

Remembrancer of Legal Affairs.

U.O.R. to R.D. No 7049 , dated the 25th June 1949.

V.M.D./15-6
40.

Office of the R.L.A.

The legal position affecting both parties to the Contract in this case is perfectly obvious. Under section 20 of the Indian Contract Act, it is only when both the parties to an agreement are under a mistake as to a matter of a fact essential to the agreement that the agreement can be avoided. If the contract was caused by one of the parties being under a mistake as to a matter of fact, it is not voidable (section 22). The mistake here was on the part of the Government. The contractors would be entitled to contend that Government had made a counter-offer to them which they accepted and there was therefore no scope of any mistake so far as they were concerned. Government cannot therefore avoid the contract to pay 0-8-0 per ton mile for long trips on the ground of mistake.

The contract however suffers from another fundamental defect in that it is not expressed to be made by or on behalf of the Governor of Bombay as required by section 175 of the Government of India Act. From this point of view it can successfully be contended that there is no valid enforceable contract between the parties and therefore the contractors cannot claim to be paid at the rate of 0-8-0 per ton miles for trips exceeding 5 miles. If this aspect of the case is brought to thier notice the contractors will probably realise the futility of sticking to the letter of the written agreement and accept the rate of 0-5-3 per kwanil ton mile. If they still remain adament, and proceed against Government in a civil court, it will be possible to urge that in the absence of a valid contract, Government is not bound to pay at the rate of 0-8-0 per ~~transhipment~~ mile and that the intention of the parties as can be gathered from the correspondence was that only 0-5-3 per to mile should be paid for trips exceeding 5 miles. It may not be a very

strong line of defence, but it is at any x rate the only plausible defence to the Contractor's claim.

Sd/- P.M.Lad.

29-6

Remembrancer of Legal Affairs.

U.R. to D.C.S. (Accounts) No. 7216 , dated the 29th June 1949.

V.M.D./ 15-6
4c.

Office of the R.L.A.s

The first question raised for the R.L.A.'s consideration is whether the contractor is entitled to the rates mentioned in Schedule 'B' for the additional items of work ℓ or to the rates mentioned in the Schedule of Rates of the Division for such work. Clause 14 of the conditions of Contract provides for payment for additional works arising out of alterations in specifications and designs at the rates mentioned in the Schedule of rates of the Division or at the rates mutually agreed upon between the parties whichever are lower.

In Schedule B to the Contract rates for additional items of work likely to crop up during construction are mentioned and these rates are specifically made subject to the provisions of Clause 14 of the Contract document. Consequently, the rates mentioned in this Schedule have to be read along with Clause 14 and reconciled. On so reading it would be apparent that the Contractor would be entitled for additional work to the rates in the Schedule of Rates of the Division or to the rates mentioned in Schedule B, which ever are lower. If no rates are specified for the additional work in the Schedule B, the Contractor would apparently be entitled to the rates in the Schedule of rates of the Division. It is presumed that the Schedule of the Rates of the Division is revised from time to time so that they should be in conformity with the market rates. If so, the Contractor can have no equitable claim to the rates mentioned in the Schdule B even though such rates are higher than the rates in the Schedule of Rates of the

Division.

The second question for the R.L.A.'s consideration is whether the Contractor is entitled to demand higher rates for quantities in excess of 20 per cent of those mentioned in Schedule B. Condition 37 of the conditions of the Contract provides that "quantities shown in the tender are approximate and no claim shall be entertained for quantities of work executed being either more or less than those entered in the tender or estimate." Clause 5 of the general Specifications attached to the contract provides, "The quantities given in the tender are approximate and may vary within 20%. Excavation for the foundation will be according to the actual strata to be met with . The Contractor ~~exhibitor~~ shall have no claim for compensation on account of any variation in the quantities." This of-any clause will have to be read with Condition 37 of the the Conditions of the Contract and reconciled. It would, therefore, be clear that the Contractor would certainly be entitled to compensation if the quantities used for the excavation of the work are in excess of 20% of the quantities specified in the Schedule. This compensation will have evidently to be assessed on the basis of the market rates or at the rates mutually of the market rates or at the rates mutually agreed upon.

Sd/- P.M.Lal
3.8

Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 8770 dated the 4th August , 1949.

Office of the R.L.A.

The question raised for the R.L.A.'s considera - tion is : Assuming that there was wilful negligence on the part of the agents of the contractors, whether Government would be entitled to claim more than Rs. 5,000/- as damages, in view of clause (vi) of the agreement at pages 41-43.

The agreement at pages 41-43 was entered into between the Government and the contractors . The terms of the contract are specified in clauses (i) to (x). Clause (i) provides for taking delivery of the casks and clause (ii) prohibits the taking on vessels of cargo or goods of any kind when the vessels are used for the transport of casks. Under clause (iii) the contractors are required to defray all or any charges, duties, dues or rents, etc. Clause (iv) provides that the contractors will not be held responsible for any damage to or loss of drums, wooden casks, packages or liquor due to acts of enemies during war or to natural causes such as storms, lighting or any similar accidental causes beyond the contractor's control and not due to contributory negligence of the contractors or their agents. Clause (v) provides for the contractors receiving and accepting the charges of transport, etc. Clause (vi) provides that the Contractors shall pay the said Commissioner or any other officer who may be authorised in this behalf any sum not exceeding Rs. 5,000/- only that may be a ssessed as amount of damage in any particular case by the Commissioner. Other clauses are not relevant. Reading these clauses together, it appears clear that in the event of breach of the agreement for any reason other than that mentioned in clause (iv) the contractors would be liable to damages not exceeding Rs.5,000/- . The terms "liquidated damages" is applied where the damages have be-

agreed and fixed by the parties or fixed by the statute as in the case of damages against parties to a dishonoured bill of exchange. (See Chitty on contracts p. 408). In General Accident Corporation V. Mool (1902) 1 K.B. 377) it was held that the plaintiff might be entitled to recover more than the liquidated damages if he had suffered damage of an amount not contemplated by the parties in agreeing the liquidated damage, that is, liquidated damages extending only to demurrage did not debar the plaintiffs from claiming also for breach of contract to load a full cargo. Under clause (vi) of the agreement in the present case, the maximum limit of liquidated damages is fixed at Rs. 5,000/-. The damages arising out of negligence of the contractors or their agents, be it wilful or contributory, cannot exceed Rs. 5,000/- as provided in clause (vi.). Such damage is clearly contemplated by implication in clause (iv) of the agreement. Consequently, even if the actual damages exceed Rs. 5,000/- , Government would not be entitled to claim more than Rs. 5,000/- merely on the ground that there was wilful negligence on the part of the contractors' agents.

Sd/- P.M.Lad
8-10
Remembrancer of Legal Affairs.

U.R. to S.D., No. S 11304, dated the 10th October 1949.

V.M.D./ 15-6
43.

Office of the Raisa.

Breach of agreement with Government whether Mr. Badami is liable to refund the costs of his training in U.K., to Government.

In his letter dated the 21st July 1948 to the Joint Secretary to Government, Education and Industries Department, Mr. Badami contended that his appointment at the R.C.T. Institute was in a temporary capacity and that when he received his pay slip from the Accountant General of Bombay which stated that his pay from 12th April 1948 was 'nil' he presumed that this services would not be required after that dated and he applied on 29th January 1948 to Government for the clarification of this point, but no reply was given to him. His pay bill for the period from 1st to 11th April 1948 was also not passed by the Treasury. He, therefore, presumed that his services would not be required from 12th April 1948.

2. The answer to that is that Mr. Badami had no reason to presume that his services would not be required after 12th April 1948 . In reply to his letter dated the 29th January 1948 he was informed telegraphically by the Director of Industries, Bombay, on the 6th April 1948, that the presumption that his services would not be continued beyond 11th April 1948 was not correct. The pay-slip issued to Mr. Badami by the Accountant ~~General~~ General on the 15th January 1948 authorised him to draw his pay till 11th April 1948 only because the scheme for the reorganization of the R.C.T. Institute under which the post given to him was created was sanctioned in the first instance for one year only ending 11th April 1948 (vide G.R.E.D.No. 7114 dated 12th April 1947). When Mr. Badami made a reference to the Accountant General on 1st May 1948 the latter requested the Director of Industries on 12th May 1948 to point out the order sanctioning the continuance of his post beyond 11th April 1948 . The Director of Industries informed the Accountant General on 25th May 1948 that Government had sanctioned the continuance of the post up to 31st May 1948 and accordingly on 26th Ju-

the Accountant General informed Mr. Badami that he might draw his pay and allowances up to 31st May 1948. Mr. Badami has purposely refrained from referring to this correspondence in his letter of 21st July 1948, and also in his subsequent correspondence. He had clearly no justification to presume that his services would not be required from 12th April 1948.

3. Mr. Badami might perhaps try to make capital out of the fact that he was employed in a temporary capacity only. Such argument will avail him nothing. It may be noted that ever since his return to India the Government of Bombay had made ceaseless efforts to employ him in a post suitable to his training and technical qualifications. As the period of three months within which he was to be given service was drawing to a close, he was ~~twice~~ offered a provisional employment at the R .C.T. Institute, Ahmedabad, so that Govt. may not be deprived of his services. But all the while Government were in communication with the Heads of various departments and with the Government of India in their effort to give suitable post to Mr. Badami. While the matter was still under consideration and before any final decision could be taken Mr. Badami accepted the post at Tatanagar as can be seen from his letter to Govt. dated the 8th May 1948. His subsequent letter dated the 29th April 1949 shows that he had already entered into correspondence with the Tatas from the 1st August 1947, i.e. even prior to the date on which Govt. offered him employment at the R.C.T. Institute, Ahmedabad. He did so without having informed Government and without tendering resignation. Even if the post given to him at the R.C.T. Institute at Ahmedabad had been discontinued after the 31st May 1948, he had no reason to suppose that his services after that date would be dispensed with. It was Government's

responsibility to give him another post after that date. There can be no doubt that his conduct in accepting private employment constitutes a breach of agreement with Government and he is, therefore, liable to refund to Government all costs incurred by Government for and incidental to his training in United Kingdom.

Sd/- P.M.Lad.
21-12

Remembrancer of Legal Affairs.

U.R. to H.D. No. 606- Confl , dated the 21st December 1949

'V.H.D./- 15.6
4c.

Forfeiture of deposit.

It appears from the tender form that the Karnatak Printing Press agreed to supply two laths copies of Gujarati Reader I by 30th of November 1948. Clause 6 of the tender provides for the deposit of a sum of Rs. 1000 and clause 7 for the payment of earnest money of Rs. 500. Government accepted this tender and the same was communicated to the Karnatak Printing Press by a letter dated 4th October 1948. Soon after the tender was accepted, the press copy of the Reader along with instructions for its printing etc. were supplied to the press by the Secretary of the Gujarati Text Books Committee. The Press, however, did not send the first proof until 4th December 1948 inspite of reminders, nor did it supply the sample of the paper until 20th December 1948 notwithstanding the fact that instructions for the same were issued on 22nd September 1948. The first proof of the Reader was returned duly corrected by the Secretary on 10th December 1948 and final instructions for printing were issued by the Secretary sometime before 11th January 1949. Soon there after the D.P.I. also issued instructions to the Press to despatch copies of the Reader by the end of the week and the Manager of the Press agreed to finish the work of printing by the end of the ensuing week. However the Press began supplying copies by the beginning of April and could send the whole lot by 20th June 1949. The question raised for R.L.A's consideration is whether the two sums of money deposited with Government can be forfeited on the ground that the Press was unable to perform its contract within the specified time.

Clause 6 of the tender provides "for the performance of this contract I undertake to deposit a sum of Rs. 1000

pledged to the Government of Bombay and in the event of failing to perform any of the terms of the contract, I shall be liable to forfeit the sum or any portion of it as Government may decide. "

Clause 7 provides - " The earnest money of Rs. 500 (Challan for which is herewith enclosed) will remain with Treasury Officer until the decision of Government as to the acceptance of the tender is made known. Should my tender be accepted and should I fail to carry out the contract, I do so knowing that by such action I forfeit to Government the earnest money deposited. " There appears in law not much distinction between earnest money and deposits, for both of them are intended to be a guarantee for the performance of the contract and as such in the nature of moneys staked. The deposit or earnest money is to be returned when the contract is duly fulfilled but can be forfeited only if the transaction falls through by reason of the default of the party to the contract. The distinction between clause 6 and clause 7 appears to be this, that under the latter, the whole amount would stand forfeited in the event of non-fulfilment of the contract while under the former, it would be open to Government to forfeit either the whole or any part of the sum in the event of the breach of any of the terms of the contract. It is true that the contract had been fulfilled but it was beyond the stipulated time. " It is a good defence to an action for the breach of any contract whether made by parol or specialty that the cause of action has been discharged by accord and satisfaction, that is to say, by an agreement after proof whereby some consideration other than his legal remedy is to be accepted by the party not in fault, followed by

performance of the substituted consideration. " (see Chitty on Contracts. p. 286). Although the filfilment of the contract was accepted by Government even after breach, there was admittedly no consideration received by Government for the same. Consequently the principle of accord and satisfaction would not come in the way of Government claiming forfeiture of the two sums of money deposited with Government as a guarantee for the performance of the contract. A similar question arose in Trikamji vs. the Karachi Port Trust (10 Sind Law Reporter p. 4). It was held :-

" When the defendants committed a breach of contract they lose their right to recover their deposit, the plaintiffs were entitled to keep it even if the breach involved them no loss as was the case in Ouse vs. Smith. (1884 L.R. 27, Chancery D. 89) but if they are not satisfied with deposit and seek to recover damages there is no authority w which would justify them in recovering damages without giving credit for the deposit." In the present case, Government does not propose to recover damages for the breach of the contract that is to say for non-fulfilment of the contract within the stipulated time. It would therefore be competent for Government to forfeit both the deposits (Rs. 1000 ---- clause 6 and Rs. 500 under clause 7).

Sd/- P.M.Lad
5.10

Remembrancer of Legal Affairs.

U.R. to E. & I.D. No. 634-Confl,dated the 6th October 1949.

V.M.D./-16.6
43.

Office of the R.L.A.

It appears that Mrs. Macfarlane was appointed a Nurse to His Highness the minor Maharao Saheb of Sirohi State on Rs.400/- per month from 9th June 1946. One of the conditions of the contract of service was that services were terminable with one month's notice on either side. She proceeded on two month's privilege leave on 9th November 1948 and applied for three weeks' extension which was granted on 4.1.1949 subject to a specific direction that before ~~xxxxxx~~ resuming her duties/ She should obtain previous orders for the purpose. On 20th January 1949, that is before the extended leave expired, she sent a telegram to the following effect:- "Accept Resignation, one month's notice." On 16th February 1949, she wrote a letter expressing her desire to rejoin her duties but she was informed that as she had already resigned nothing could be done. She is now claiming one month's notice pay from 20th January 1949 to 20th February 1949. The question raised for the R.L.A's consideration is whether Mrs. Macferlane's claim is tenable.

/A contract of service is continuing in its nature, and its continuance and the obligations under it an only be terminated in certain defined modes. Mere resignation obviously is not enough unless it would be assented to or unless it complied with those terms which the law implies or the ~~xxx~~ prior agreement of the parties may permit./ Ganesh Ramchandra Gadgil v. G.I.P. Railway (2 Bom. L.R. 790). It is therefore clear that the telegram to the effect 'accept resignation, one month's notice' would only mean termination of the contract after one month, and this notice was perfectly in accordance with the terms of the contract of service. No communication was sent to Mrs. Macfarlane accepting the resignation as from the 21st of January 1949. It is true that either on 21st ~~of~~ January 1949, i.e. immediately after the notice or on expiry of the extended leave Mrs. Macfarlane should have offered to resume her duties. She absented herself from duties whereby she rendered herself liable

to dismissal for misconduct. But the Sirohi State did not her from services nor any intimation in respect thereof was given to her. It would, therefore, follow that the contract of service was not terminated by the Sirohi State on the ground of her absence from duties. Consequently, the contract subsisted and Mrs. Macfarlane was entitled to resume duties within the period. On 16.2.1949 she wrote to the Administrator, Sirohi State, offering to resume duties. The Sirohi State was bound to allow her to resume duties, particularly when the contract was to terminate at the end of the notice period and Mrs. Macfarlane was not dismissed from service on the ground of her absence from duties without permission.

3. As stated above she had given one month's notice which would expire, according to her own admission, on 20th February 1949. She offered to resume duties on 16th February 1949. As she had no leave to her credit she would not be entitled to pay for the period of absence from duty i.e. for the period from 20.1.1949 to 15.2.1949; but she would be entitled to her pay from 16th February 1949 to 20th February 1949 as she was not allowed to resume duties.

Sd/- P.M.Lad.
3.12.

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 14002 , dated the 5th December 1949.

V.M.D./- 16.6
4a.